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No. 91-2082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATHAN A. RICE, BOBBY R. WATSON AND BOB SEYMOUR,

Petitioners,

v.

JAMES CALVIN MITCHELL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, INDIANA, KANSAS, MAINE, MARYLAND, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Fourth Circuit held that prison officials are not entitled to qualified immunity for denying out-of-cell exercise privileges to a violently assaultive, maximum security inmate after less restrictive measures to control the inmate had repeatedly failed. This case presents these questions:

1. How does the objective qualified immunity test of legal reasonableness apply when constitutional rights containing a subjective state of mind element are allegedly violated?

2. Does the Fourth Circuit's refusal to grant qualified immunity to prison officials who exercised their discretion to revoke an extremely violent prisoner's out-of-cell exercise privileges conflict with applicable

qualified immunity and Eighth Amendment decisions of this Court?

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Pursuant to Sup.Ct.R. 37, amici curiae respectfully submit this brief in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case, which arises out of prison officials' denial of out-of-cell exercise privileges to an incorrigibly violent inmate, presents this Court with the opportunity to define for the first time the scope of the qualified immunity defense in the context of an alleged Eighth Amendment violation, and to address the currently unresolved but important issue of how the objective test of legal reasonableness applies when the acts complained of affect constitutional rights in which the officials' state of mind is a substantive element.

The qualified immunity claim in this case hinges on whether denying out-of-cell exercise privileges to an unpredictably assaultive prisoner violates clearly established law, which

prohibits the officials who took these actions from doing so with deliberate indifference. This Court has not decided, however, how the qualified immunity test of objective legal reasonableness applies to government action that allegedly violates a constitutional right containing a subjective state of mind component. This Court should review the Fourth Circuit's decision and establish the standards that the lower courts are to apply when such a right is at issue.

In refusing to decide whether the prison officials in this case are entitled to qualified immunity, and holding instead that the qualified immunity test requires that the officials first be subject to trial to determine their mental state, the Fourth Circuit has fashioned a rule that strips

prison administrators of any meaningful immunity from suit and fully exposes them to substantial adverse social costs. This case warrants review because the decision below is an unprecedented expansion of the Eighth Amendment at the expense of effective and efficient government.

REASONS FOR GRANTING REVIEW

I. THIS CASE PRESENTS THE IMPORTANT QUESTION OF FIRST IMPRESSION OF HOW THE QUALIFIED IMMUNITY TEST OF OBJECTIVE LEGAL REASONABLENESS APPLIES WHEN CONSTITUTIONAL RIGHTS THAT CONTAIN A SUBJECTIVE COMPONENT ARE ALLEGEDLY VIOLATED.

This case presents "an important question of federal law which has not been, but should be, settled by this Court." Sup.Ct.R. 10.1(c). That issue is how the objective qualified immunity test of legal reasonableness set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), applies when the allegedly

violated constitutional right contains a substantive subjective element.

The Fourth Circuit correctly observed that a determination of whether the prison officials in this case acted with deliberate indifference and inflicted cruel and unusual punishment requires an inquiry into the officials' state of mind. (App. at 125), citing Wilson v. Seiter, 111 S.Ct. 2321, 2324, 2326 (1991). But this Court in Harlow rejected the inquiry into state of mind that its earlier qualified immunity decisions called for, see, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975), and set forth instead a standard that reviews "the objective legal reasonableness of an official's acts," Harlow, 457 U.S. at 819, because of the "substantial costs [that] attend the litigation of the subjective good faith

of government officials," including intrusive inquiries into officials' mental states that can be "peculiarly disruptive of effective government." Id. at 816, 817.

This case thus illustrates the "tension" that Justice Kennedy's concurring opinion in Siegert v. Gilley, 111 S.Ct. 1789, 1795 (1991), noted exists between Harlow's rationale, which eliminates judicial inquiry into subjective good faith and the disruptive, sweeping discovery that such an inquiry entails, and allowing plaintiffs to prove state of mind -- which as a question of fact is not well-suited for summary judgment -- when it is a substantive component of the constitutional right at issue.

As one court of appeals has observed, if Harlow results in

"attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution," then "that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong -- as it is in cases of racial discrimination, excessive punishment, and many other constitutional torts." Elliott v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991). Justice Kennedy has accordingly proposed that the "heightened pleading standard is a necessary and appropriate accommodation between the state of mind component . . . and the objective test that prevails in qualified immunity analysis as a general matter." Siegert

v. Gilley, 111 S.Ct. at 1795 (concurring).

The federal appellate courts have adopted a variety of approaches, which are not altogether consistent, in attempting to reconcile the goal of resolving immunity questions as early as possible with the competing interest in allowing remedies for intentional constitutional wrongs.[1] This Court should review this issue of first impression and set forth the standards the lower courts are to uniformly apply in deciding qualified immunity claims in

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[1] See, e.g., Branch v. Tunnell, 937 F.2d 1382, 1385-87 (9th Cir. 1991); Elliott v. Thomas, 937 F.2d at 344-46; Siegert v. Gilley, 895 F.2d 797, 800-02 (D.C. Cir. 1990), aff'd on other grounds, 111 S.Ct. 1789 (1991); Collison v. Gott, 895 F.2d 994, 1001-1004 (4th Cir. 1990); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 647-50 (10th Cir. 1988); Musso v. Hourigan, 836 F.2d 736, 743 (2nd Cir. 1988); Elliott v. Perez, 751 F.2d 1472, 1479-82 (5th Cir. 1985); see also United States v. Michigan, 940 F.2d 143, 154 n.7 (6th Cir. 1991).

cases arising out of constitutional rights containing state of mind elements.

II. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT IN REFUSING TO GRANT QUALIFIED IMMUNITY TO PRISON OFFICIALS WHO HAVE MADE THE CONSIDERED DECISION TO DENY OUT-OF-CELL EXERCISE PRIVILEGES TO A VIOLENTLY EXPLOSIVE PRISONER.

Review of this important novel issue is particularly appropriate in this case because the Fourth Circuit "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct.R. 10.1(c). While this Court has never reviewed a qualified immunity claim in the setting of an alleged Eighth Amendment violation, the rationale of its prior decisions mandates reversal of the decision below.

A principal focus of the doctrine

of qualified immunity is on "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . ." Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). In denying the officials' immunity claim in this case, however, the Court of Appeals made no finding that the officials violated clearly established law.

Rather, after stating that it, like other courts, has "never held that denial of out-of-cell exercise opportunities is per se unconstitutional cruel and unusual punishment" (App. at 122), and that "penological considerations may, in certain circumstances, justify [such] restrictions" (id. at 123), the court below refrained from deciding the immunity claim raised here, finding

instead that such a determination "would be better accomplished by a trial judge after a full hearing on the facts." (Id. at 125.) The Court of Appeals thus instructed the district court on remand to determine whether the prison officials violated clearly established law by conducting "[a] detailed review of the feasibility of alternatives in this case, such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise. . . ." (Id.)

The Fourth Circuit's express acknowledgment that "[w]e do not decide by this opinion the constitutionality of prison officials' actions here" (App. at 125), is in direct contravention of this Court's repeated emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation," Hunter v. Bryant, 112

S.Ct. 534, 536 (1991); see also Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987); Mitchell v. Forsyth, 472 U.S. at 526; Harlow v. Fitzgerald, 457 U.S. at 818, because "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Siegert v. Gilley, 111 S.Ct. at 1793.

In refusing to address the validity of the conduct at issue here and remanding this case for a trial on the merits, the court below has subjected these officials to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Id. It is precisely these demands that the

doctrine of qualified immunity was designed to avoid, as the Fourth Circuit's detailed discussion of the government action challenged in this case (App. at 115-16) demonstrates that that action invoked no clearly established rights warranting the denial of the prison officials' immunity.

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. at 640. Here, the Fourth Circuit noted that "in most circumstances withholding all exercise opportunities from a prisoner over an extended period of time violates the Eighth Amendment. Yet Mitchell's unmanageable, violent nature may present exceptional circumstances

here, justifying the deprivation." (App. at 123) (emphases added). The Fourth Circuit's remand of this case to determine whether such exceptional circumstances exist demonstrates the legitimacy of that question and that the actions challenged here did not violate clearly established law.[2]

Because "[s]uch officials as . . . prison wardens . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them," Davis v. Scherer, 468 U.S. 183, 196 (1984), the Eighth Amendment "requires that neither judge nor jury freely substitute their

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[2] See Mitchell v. Forsyth, 474 U.S. at 535 n.12 ("where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law."); Anderson v. Creighton, 483 U.S. at 641 ("The same is true of [officials'] conclusions regarding exigent circumstances.").

judgment for that of officials who have made a considered choice." Whitley v. Albers, 475 U.S. 312, 322 (1986). Rather, qualified immunity "gives ample room for mistaken judgments," Malley v. Briggs, 475 U.S. 335, 343 (1986), and that protection is particularly broad in cases arising out of an Eighth Amendment claim, where "courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives." Whitley v. Albers, 475 U.S. at 322.

Yet the Fourth Circuit refused to grant qualified immunity until such an inquiry concerning the officials' reasonableness was made on remand. (App. at 125-26.) That holding is irreconcilable with this Court's Eighth Amendment decisions and similarly is in

conflict with this Court's decisions recognizing that qualified immunity principles do not require determining whether officials could have acted more reasonably. See Hunter v. Bryant, 112 S.Ct. at 537. This Court should grant review to address these conflicts and reverse the Fourth Circuit's decision.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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